

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 27th day of
February, 2007.

Cathy J. Orlor,)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-2006-0082, et al.</u>
)	
Folsom Ridge, LLC,)	
)	
and)	
)	
Big Island Homeowners Association Water)	
and Sewer Association, Inc., f/k/a Big Island)	
Homeowners Association,)	
)	
Respondents.)	

**ORDER DENYING MOTION TO COMPEL AND DENYING REQUEST
FOR SANCTIONS**

Issue Date: February 27, 2007

Effective Date: February 27, 2007

Background

On February 2, 2007, Complainants Stan Temares, Cathy J. Orlor, Benjamin D. Pugh, and Joseph Schrader jointly filed a pleading captioned: "Full Disclosure to the Commission of Complainants' Request to Respondents for Big Island Home Owners' Water and Sewer Association, (F.K.A. – Big Island Homeowners' Association), Membership and Billing Records VIA Date Requests." In that pleading, these Complainants objected to the

answers they had received from Respondents in relation to certain data requests. The specific data requests, according to Ms. Orlor, were made on September 24, 2005.

Complainants did not provide the Commission with the exact language of their data requests in their pleading. However, in the Commission's June 15, 2006 order directing the Respondents to answer or object, the Commission noted that the information requested by Ms. Orlor exceeded the scope of her September 24, 2005 data requests. Nevertheless, the Commission directed Respondents to either answer or object to data Ms. Orlor was requesting.

Respondents timely complied with the Commission's order on June 26, 2006. The responses, as provided to the Commission by the Complainants, are as follows:

Data Request Number 1

"A list of members of the Big Island Homeowners Water and Sewer Association, Inc. for the period of time requested has been previously supplied by Respondents in a data request response of April 14, 2006. The information supplied on April 14, 2006 is the best information available from the Association records."

Data Request Number 2

"Respondents object to this request on the grounds that it is unreasonably burdensome and expensive. The information is equally available to complainant from the Recorder of Deeds, Camden County Courthouse."

Data Request Number 3

"Respondents object to this request on grounds that it is unreasonably and unduly burdensome and expensive. This request involves assembly, copying and production of over 2500 documents. Respondents further object on grounds that the data request is overbroad in that it spans nearly six years of billing and payment information. Furthermore, the data is cumulative of facts and data already compiled by the staff of the Commission in connection with its recommendation in this case.

Complainants sought no further action from the Commission regarding these responses until they filed their February 2, 2007 pleading.

In the Complainants' February 2, 2007 pleading, it is alleged that Respondents' reply was unsatisfactory because it was incomplete, and that any expense associated with responding could have avoided by Respondents having complied sooner. Complainants requested sanctions and penalties with an effective date of September 24, 2005, the original date of their data requests. Complainants further asked the Commission to compel Respondent Big Island Homeowners Association to produce the requested information.

On February 20, 2007, Complainants Stan Temares, Cathy J. Orlor, Benjamin D. Pugh, and Joseph Schrader jointly filed a request for sanctions pertaining to the same data requests and responses addressed in their February 2, 2007 pleading. The Complainants request the Commission "to impose sanctions with penalties and fines in the amount of \$753,865.76 which is the total cost of the Delivery System, Sewer Plant and Water Plant, (from the Feasibility Study generated in the Application Case No. WA-2006-0480 et al.)."

Respondents' Reply

On February 21, 2007, Respondents filed a response with the Commission to Complainants' motions. Respondents correctly note that no order has been issued by the Commission overruling their objections to the data requests or to compel further responses to those data requests. Respondents also point out that Complainants have not complied with Commission Rule 4 CSR 240-2.090(8) in that they have not conferred in good faith with Respondents to resolve the objections to the data requests or engaged in a discovery conference with the presiding officer in this matter prior to filing their motions to compel.

Additionally, Respondents challenge the merits of Complainants' motions. Respondents note that they are not obligated to provide information they do not have; provide information in a particular form or shape that is different from the way in which it is kept by the Respondents; answer burdensome or oppressive data requests; or provide information that is a public document equally available to Ms. Orler or the Complainants.

Regarding Data Request No. 1, Respondents note that Complainants cannot require them to produce information they do not have. Respondents also correctly observe that Complainants' motion does not express how Complainants have been prejudiced in the preparation of their own case by the response given to Data Request 1 or by lack of the information to which objections have been asserted.

Regarding Data Request No. 2, Respondents claim, as their objection so states, that Ms. Orler requested signed ratification documents pertaining to "Covenants and Conditions" and their amendments that affect property on Big Island. These documents are not regularly maintained by the Association, but are available from the Camden County Recorder of Deeds offices in exchange for payment of required fees.

With regard to Data Request No. 3, Ms. Orler has requested bills, billing statements, invoices and other communications regarding fees, dues, expenses and rates charged by the Association for water and sewer services rendered from January 2001 to the date of her request. This request involves production of an estimated 2500 documents. Respondents contend that to meet this request the Association will need to dedicate an employee to 1) retrieve these records manually and electronically (to the extent that have been recorded electronically); 2) assemble the records; 3) mark any communications that may have confidential or privileged communication for review by counsel; and 4) prepare

them for shipment from their archive point in Colorado. Respondents claim they have rightly objected to this on grounds of its undue burden and expense. Ms. Orler has not offered to advance Respondents' costs in meeting this request and there is a very real question respecting why this voluminous information is important or relevant to the complaints. The burden on the record at hearing should also be considered.

Respondents have further offered to consider a stipulation with respect to the facts Ms. Orler seeks to establish through these documents, subject to any and all relevancy or materiality objections available at hearing. This solution would avoid the extraordinary cost and expense associated with Data Request No. 3 and would promote an expeditious resolution of these matters given the evidentiary hearing is set to begin on February 28, 2007.

Relevant Commission and Supreme Court Rules

Commission Rule 4 CSR 240-2.090(1) allows for discovery as in civil actions in circuit court.¹ This subsection also states: "Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure." Data requests, however, are unknown in the rules of civil procedure and are created by the Commission's procedural rules at 4 CSR 240-2.090(2). Data requests, as defined by the rule, are "an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties." Data requests are analogous to interrogatories, requests for admission or requests for production as delineated in Supreme Court Rules 57, 58, and 59.

¹ See also Section 536.073, RSMo. 2000. Supreme Court Rule 56.01(b) allows discovery regarding any matter, not privileged, that is relevant to the subject matter.

Sanctions for violations of discovery rules are encompassed in Supreme Court Rule 61.01. The exact sanction for any alleged violation or noncompliance will vary depending upon the circumstances and the discovery device employed. Applying this rule to the current situation, the relevant sanctions for failure to answer or respond to a data request could include an order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. Other sanctions include treating a party as being in contempt of the Commission, and/or ordering the party to pay reasonable expenses, including attorney's fees, caused by the failure to comply.

However, it should be kept in mind that no discovery violation can be alleged to have occurred and no sanction can be ordered unless the parties have followed proper procedure and exhausted all authorized attempts at securing the requested information.

Commission Rule 4 CSR 240-2.090(8) provides:

(8) Except when authorized by an order of the commission, the commission will not entertain any discovery motions, until the following requirements have been satisfied:

(A) Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion; and

(B) If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the commission for an immediate telephone conference with the presiding officer and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.

Discussion/Decision

In the instant matter, the Complainants had not conferred in good faith with Respondents in an attempt to resolve the objections to the data requests or arranged for a discovery conference with the presiding officer and opposing counsel to attempt to resolve the dispute as required by 4 CSR 240-2.090(8)(A) and (B) at the time of filing their motions. The February 2, 2007 and February 20, 2007 pleadings from the Complainants, even if construed as proper motions to compel, which they are not, were filed prematurely.

At the request of Ms. Orlor, a discovery conference was held regarding these data requests on February 22, 2007. During that conference, the Respondents and Ms. Orlor agreed that Respondents could answer her requests by use of stipulations to the underlying facts that Ms. Orlor was seeking. Having agreed to settle the matter, the presiding officer asked Ms. Orlor if she wished to withdraw the motions to compel and for sanctions. Ms. Orlor declined and asked for a ruling on the motions as they stand.

It should be noted that the Respondents are not in violation of any Commission order, and the sanctions requested by the Complainants exceed any sanction the Commission has authority to impose. Moreover, the Commission finds that the objections to the data requests registered by the Respondents are reasonable, and the alternative solution of providing agreed upon stipulations effectively renders the motions to compel moot. Consequently, the Commission shall deny Complainants' requests to compel responses and for sanctions, penalties and fines.

IT IS ORDERED THAT:

1. Stan Temares's, Cathy J. Orlor's, Benjamin D. Pugh's, and Joseph Schrader's February 2, 2007 pleading requesting an order compelling responses to data requests is denied.
2. Stan Temares's, Cathy J. Orlor's, Benjamin D. Pugh's, and Joseph Schrader's February 2, 2007 pleading requesting sanctions is denied.
3. Stan Temares's, Cathy J. Orlor's, Benjamin D. Pugh's, and Joseph Schrader's February 20, 2007 pleading requesting sanctions, penalties and fines is denied.
4. This order shall become effective on February 27, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents

Stearley, Regulatory Law Judge